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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 310

AUDLEY MOORE AND SON,
Petitioners,

v.

GENERAL INSURANCE COMPANY OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

ARTIE P. STEPHENS,
110 N. Davis St.,
Sulphur Springs, Texas.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

AUDLEY MOORE AND SON,

Petitioners,

v.

GENERAL INSURANCE COMPANY OF AMERICA,

Respondent.

To the Honorable Mr. Justice Burger, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioners herein, Audley Moore and son, pray that a writ of certiorari issue to review the final action of the United States Court of Appeals, Fifth Circuit, entered on the 4th day of April, 1969, which said final decree upheld its decree entered on the 21st day of January, 1969, which reversed and remanded the judgment of the United States District Court for the Eastern District of Texas, in favor of the Petitioner.

The opinion of the Court of Appeals is attached as Exhibit A, and the Order Overruling the Motion for Rehearing is Exhibit B. The opinion of the Court of Appeals is reported in 406 F. 2d 442.

I.

JURISDICTION

The opinion of the United States Court of Appeals was entered on January 21, 1969, and Petitioner's Motion for Rehearing was denied on April 4, 1969.

Jurisdiction to grant this Petition is sustained by Title 28, U.S.C.A., Section 2101 and Title 28 U.S.C.A., Rule 19, Paragraph 1(b).

II.

QUESTIONS PRESENTED

1. Whether Petitioner's work of preparing its final estimate as required by the terms of its contract which included going onto the building site and measuring the quantity of concrete and asphalt work done by it was not work within the meaning of 40 U.S.C.A., Section 270b (a) and (b) as a matter of law as held by the United States Court of Appeals, Fifth Circuit.

2. Whether there was no evidence that Respondent's attorney was not its attorney prior to the filing of this cause of action as held by the United States Court of Appeals, Fifth Circuit.

3. Whether the United States Court of Appeals, Fifth Circuit, had jurisdiction over this case in view of the fact that Respondent's Motion for Judgment notwithstanding verdict had not been acted upon by the Trial Court and was and is still pending before the Trial Court.

4. Whether the United States Court of Appeals, Fifth Circuit, had authority to reverse this case with instructions to enter judgment for Respondent or whether its authority in the event that its reversal was proper was to remand to the Trial Court for a new trial.

III.

STATUTES AND RULES INVOLVED

1. The statute involved in this case is Title 40 U.S.C.A. Section 270b (a) and (b) which is set out in Exhibit C.

2. The rules involved are Rules 50(b) and 59(a) of the Federal Rules of Civil Procedure, Title 28 U.S.C.A. which rules are Exhibits D and E respectively.

IV.

STATEMENT OF THE MATTERS INVOLVED

1. This was a suit instituted by the Petitioner on April 20, 1967 under the Miller Act, 40 U.S.C.A. 270, against Respondent who was the bonding company for Professional Constructors, Inc. The Petitioner entered into a Contract (Plaintiff's Exhibit 1) with Professional Constructors, Inc., Respondent's insured, in connection with the construction of a United States Post Office Building in Sulphur Springs, Texas. Petitioner's Contract was essentially site work, concrete and asphalt paving. After April 2 or 4, 1966, the Petitioner did not do any more work in so far as laying concrete or pouring asphalt. Audley Moore and his son, the sole owners of Petitioner, in the latter part of April, 1966,

did go to the building site to make a final inspection and also to make measurements of the concrete and asphalt work it had done in order to prepare its final estimate. (Plaintiff's Exhibit 2) which was prepared on May 4, 1966. This evidence was uncontracted. The essential question involved under this question presented is whether or not this work done by Petitioner was work within the meaning of the Miller Act and the Contract between the Petitioner and Respondent's insured, Professional Constructors, Inc. The contract between Petitioner and Professional Constructors, Inc., (Plaintiff's Exhibit 1) contained among provisions on the front side * * *

> "4. The provisions on the reverse side hereof entitled 'General Provisions' are incorporated into and made a part of this agreement."

and on the reverse side * * *

> "3(a) On the 25th of each month * * * Sub-Contractor shall submit to the Contractor an estimate of materials on hand and work done."

2. The question under this paragraph is whether or not there was evidence that the Respondent's attorney was its attorney prior to the filing of this cause of action in that certain negotiations existed between the attorney for the Petitioner and the attorney for the Respondent in connection with the Respondent underwriting any judgment which might have been secured by the Petitioner in a State Court suit against the Respondent's insured. These negotiations became of importance based upon the Petitioner's alternative pleading estoppel.

3. The question presented in this paragraph concerns the question of whether the United States Court of Appeals, Fifth Circuit, acquired jurisdiction over this matter in that on October 13, 1967, the Respondent filed in the Trial Court its motion for judgment notwithstanding the verdict which was never acted upon by the Trial Court. And therefore, there was lacking a final decision which was necessary for appellate jurisdiction.

4. The question under this paragraph is whether or not in view of the fact that no action was taken on the Respondent's Motion for Judgment notwithstanding the verdict whether the United States Court of Appeals, Fifth Circuit, had authority to reverse this case with instructions to enter judgment for Respondent or whether its authority was limited to a reversal with instructions of remand to the Trial Court for a new trial.

V.

REASONS FOR GRANTING WRIT

1. The Supreme Court of the United States as well as all of the United States Court of Appeals have stated that a broad interpretation should be made of the Miller Act, 40 U.S.C.A. Section 270. The basic question then before this Court is whether or not the measurements and the preparation of Petitioner's final estimate constitutes work under the Miller Act, 40 U.S.C.A. 270b.

Section 270b Paragraph a of 40 U.S.C.A. provides as follows:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Section 270a of this title and who has not been paid in full thereof before the expiration of a period of 90 days after the date on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of said suit and to prosecute said action to final execution and judgment for the sum or sums justly due him." (Remainder of paragraph deals with persons not having a direct contract with the contractor furnishing a payment bond.)

The Court will note the wording of paragraph (a) that the labor or material referred therein is in connection with the work provided for in the contract. The Petitioner did make its final measurements in the latter part of April, 1966, and prepared its final estimate on May 4, 1966. The estimate that it prepared was a requirement of its contract with Professional Constructors, Inc., and this also constituted work as defined in paragraph a of Section 270b of the Miller Act.

The Court of Appeals held that the work of Petitioner's final measurements and preparation of its final estimate was no more than remedial or correction work and therefore was not labor supplied within the meaning of 40 U.S.C.A., Section 270b (b). The Court of Appeals in essence held that it would look to substantial compliance of the

contract as to determine the final date of labor or materials supplied. This is contra to the case of U.S. for use of Austin v. Western Electric Company, 337 F. 2d 568 (9 Cir.), at pages 572 and 573:

> "As noted supra, a subcontractor is required to give notice of his claim within 90 days from the date on which he performed the last labor or furnished or supplied the last material for which claim is made. He must file suit within one year from the same date. Appellees contend that the critical date is when the contract was 'substantially performed". Apparently, the district court adopted this test and found that the work was 'substantially completed' on October 25, 1960.
>
> "We do not find the phrases 'substantially performed' or 'substantially completed' used in any of the decided cases. A more accurate statement of the test to be applied is whether the work was performed and the material supplied as a 'part of correcting defeats, or making repairs following inspection of the project'."

The Courts have given liberal construction to the *Miller Act*. For example, *U. S. for use and benefit of Westinghouse Electric Supply Company v. Enderbrock-White Company*, 275 F. 2d 57 (4 Cir. 1960) dealt with the following facts:

Enderbrock was the general contractor and Aetna Casualty and Surety Company was the bonding company. Mechanical Engineering Corporation was one of Enderbrock's subcontractors and Westinghouse was a supplier of materials to Mechanical. The question before the Court was whether or not Westinghouse gave notice within ninety days after delivery of its material to Mechanical in compliance with the Miller Act. The last material from Westinghouse de-

livered on the job site was October 16, 1967. On January 15, 1958, Westinghouse notified Enderbrock by registered mail that Mechanical was indebted to it in the sum of $3,962.51. However, on December 31, 1957. Westinghouse in compliance with Mechanical's purchase order delivered to it at Westinghouse's warehouse bushings costing $2.11 which Westinghouse believed was to be used on the job in question. However, these bushings were used elsewhere. Thereafter Westinghouse amended its letter of January 15, 1958 on February 18, 1958, by adding to its original notice the cost of the bushings, $2.11. The Circuit Court in deciding that the time of notice commenced with the delivery date of the bushings reviewed some of the most recent cases dealing with time limitation under the *Miller Act*. One of such cases reviewed was *United States for use and benefit of J. B. Byrne & Co. v. Fire Association of Philadelphia*, 260 F. 2d 541 (2 Cir.) which is as follows:

> "The latest case on the question here under consideration which has come to our attention is *United States for Use and Benefit of J. B. Byrne & Co. v. Fire Association of Philadelphia*, 2 Cir. 260 F. 2d 541. There the prime contract was for excavation work on the Grass River Lock, a part of the St. Lawrence Seaway project. Heavy earth-moving motor equipment was required, and by reason of the abrasive nature of the earth at the site, the steeply inclined road, and the fact that much of the work was done during sub-zero weather, unusual wear on the tires resulted. From the inception of the contract, the repair and replacement of tires was expected to be, and was, a constantly recurring item. The use plaintiff's claim was for the repair and replacement of tires on the earth-moving equipment. Defendant contended that the burden was on plaintiff to show that the tires were substantially consumed

by the work, and that it was not liable for tires which were diverted by the contractor for use on non-bonded jobs. In overruling defendant's contentions and approving a judgment for the use plaintiff, the court said, at page 545:

"The contsruction sought by appellant creates other difficulties. Thus requiring the supplier to trace specific materials after they have left his control may often place upon him an impossible burden of proof even when the items involved were in fact consumed. Moreover, even if appropriate tracing measures could be devised, the courts, in enforcing one remedial policy, should be hesitant to compel an industry to accept what may be artificial and burdensome accounting practices. But these problems aside, the policy of the Miller Act dictates that an exception ought not to be carved out of the surety's liability for materials not actually consumed. For the statutory bond is of value to materialmen in our credit economy only as its coverage is predictable at the time the contract for the materials is created. Businessmen look to more than the contents of their cash registers in conducting their affairs. If, because the surety's liability is held suspended until the goods are consumed, the bond has little effect on the degree of certainty with which the supplier can expect to receive the purchase price of the materials sold or to be sold under the contract, it little aids the financial position of the persons Congress sought to benefit."

And, also the case of *U. S. for the use of Sherman et al. v. Carter*, 353 U.S. 210, 73 S. Ct. 793 (S.C. 1957) is illuminating as to what constitutes labor under the Miller Act. This case involved an action by the trustees of a welfare fund of a labor union on a Miller Act bond furnished by the contractor, Carter, in connection with the construction of a federal building. The contractor had entered into a con-

tract with the labor union under which the contractor was obligated to pay the laborers wages at specified rates and in addition to pay 7½ cents per hour of their labor to the trustees of a welfare fund. The contractor failed to pay in full the required contributions to the welfare fund and the trustees of the fund sued the surety of the Miller Act payment bond to recover the balance due the fund, plus liquidated damages, attorneys fees, Court costs and expenses. It was pointed out that under the contract, the contributions were payable in monthly installments with the provision that if any installment was not paid on schedule the sum of $20.00 per delinquency or 10% of the amount due, whichever was greater, would be paid as liquidated damages, and with the further provision for the payment of reasonable attorneys fees, court costs, and other reasonable expenses in the event that the trustees were required to file suit on the contract.

The Court held that although the laborers employed had no right, title or interest in the contributions to the welfare fund, the obligation assumed was part of the labor contract and to this extent was labor supplied in the prosecution of the work within the meaning of the Miller Act bond. The Court held that the contributions provided for in the contract constituted a valid claim against the surety and that recovery would also be allowed for liquidated damages, attorneys fees, court costs and other related expenses of the litigation, since such formed a part of the consideration for the contract. In so holding, the Court emphasized the provisions of the *Miller Act*, which expressly entitled the supplier to be "paid in full" and to a judgment for the

"sum or sums justly due him". The following are excerpts from the Court's opinion:

> "* * * the essence of it policy *(Miller Act)* is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his suppliers of labor and material * * *."

ALSO

> "* * * not until the required contributions have been made will Carter's employees have been 'paid in full' for their labor in accordance with the collective-bargaining agreements."

ALSO

> "* * * as long as Carter's obligations relating to compensation for labor have not been satisfied his employees will not have been 'paid in full' and the Miller Act will not have served its purpose."

ALSO

> "The trustees' claim for liquidated damages, attorneys' fees, court costs and other related expenses of this litigation has equal merit. The contractor's obligation to pay these items is set forth in the trust agreement. It is stipulated that they form a part of the consideration which Carter agreed to pay for services performed by his employees. If the employees are to be 'paid in full' the 'sums justly due' to them, these items must be included. Their amount, however, remains to be determined.
>
> "We hold that the *Miller Act* makes the surety liable on its payment bond for the delinquent contributions to the fund, together with the additional items above described. * * *".

Glassell-Taylor Co. v. Magnolia Petroleum Co., 153 F. 2d 527 (5 Cir. 1946), says that the courts inquire into whether

or not the plaintiff under the *Miller Act* furnished labor or material under the term of its contract. In the *Glassell* case, the subcontractor undertook to furnish sand and gravel to the prime contractor for use in the building of an airdrome. In this work, the subcontractor used a fleet of trucks, which of course required gasoline and oil. The gasoline and oil were procured from the use plaintiff. In the mornings, after procuring the necessary gasoline and oil, the trucks "were then driven to the airdrome site to ascertain if any material was needed. If there was hauling to be done the trucks would then go to one of the pits and haul the type of material the foreman or engineer was ready to use. If there was no work the truck driver went wherever he pleased and burned the gasoline and oil as he saw fit, either to work at another job or to travel at his pleasure". Although obviously some of the gasoline and oil furnished by the use plaintiff was not used in the prosecution of the contract, the court allowed recovery for the full amount of such gasoline and oil furnished. The court said at page 529:

> "And deliveries were made under circumstances which fully justified the use plaintiff in believing not only that they would be, but that they were in fact, used by the sub-contractor in the fulfillment of his contractual obligation. * * *"

And also:

> "The *Miller Act*, like the *Heard Act* in its original form and as amended in 1905, 40 U.S.C.A. §270a note, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to ef-

fectuate the Congressional intent to protect those who furnish labor or materials for public works. The statute and the bond given under it speaks of paying 'persons supplying labor and materials in the prosecution of the work'. The Supreme Court has repeatedly held that these quoted words in particular should be liberally construed. Thus in *United States to Use of Hill v. American Surety Co.*, 200 U.S. 197, 26 S. Ct. 168, 50 L. Ed. 437, materials furnished to a subcontractor were held covered by the contractor's bond. In *Title Guaranty & Trust Co. v. Crane Co.*, 219 U.S. 24, 34, 31 S. Ct. 140, 55 L. Ed. 72, the claims for which recovery was allowed under the bond included not only cartage and towage of material, but also claims for drawings, patterns, used by the contractor in making molds for the castings entering into the construction of the ship. In *United States Fidelity & Guaranty Co. v. Bartlett*, 231 U.S. 237, 34 S. Ct. 88, 58 L. Ed. 200, where the work contracted for was the building of a break-water, recovery was allowed for all the labor at the quarry opened 50 miles away. This included the labor not only of men who stripped the earth to get the stone and who removed the debris, but carpenters and blacksmiths who repaired the cars in which the stone was carried to the quarry dock for shipment, and who repaired the tracks upon which the cars moved. And the claims allowed included also the claims of stablemen who fed and drove the horses which moved the cars on those tracks. In *Illinois Surety Co. v. John Davis Co.*, 244 U.S. 376, 37 S. Ct. 614, 61 L. Ed. 1206, the court allowed recovery not only for the rental of cars, trucks and other equipment used by the contractor in facilitating his work, but also the expense of loading this equipment and the freight paid thereon to transport it to the place where it was used. In *Brogan v. National Surety Co.*, 246 U.S. 257, 38 S. Ct. 250, 62 L. Ed. 703, L.R.A. 1918D, 776, it was held that laborers and materials not incorporated into the work were covered and where, because of special circum-

stances, the contractor had to board the laborers, that provisions furnished to him for that purpose were covered. In *Standard Accident Insurance Co. v. United States for use and benefit of Powell et al.*, 302 U.S. 442, 58 S. Ct. 314, 315, 82 L. Ed. 350, the court held that a common carrier by railroad could recover under the statute for freight charges for transporting materials on the ground that the railroad was a corporation which had furnished labor in the construction of a public building. It was observed in that case that the Supreme Court was committed to the doctrine that the statute should be 'liberally construed in aid of the evident public object — security to those who contribute labor or material for public work.'

"In the light of these decisions it follows that the strict letter of the Act must yield to its evident spirit and purpose when this is necessary to give effect to the intent of Congress. *Rector, etc., of Holy Trinity Church v. United States*, 143 U.S. 457, 459, 12 S. Ct. 511, 36 L. Ed. 226; *Ozawa v. United States*, 260 U.S. 178, 194, 43 S. Ct. 65, 67 L. Ed. 199. And unjust and absurd consequences are, if possible, to be avoided. *Lau Ow Bew v. United States*, 144 U.S. 47, 59, 12 S. Ct. 517, 36 L. Ed. 340; *Hawaii v. Mankichi*, 190 U.S. 197, 213, 23 S. Ct. 787, 47 L. Ed. 1016."

The Petitioner completed its last work under the terms of its contract with Professional Constructors, Inc., on May 4, 1966, and therefore its suit against respondent was timely filed.

2. The question presented under this paragraph is whether or not there was evidence that the Respondent's attorney was its attorney prior to the filing of this cause of action and during the time negotiations were being made between the respective attorneys of the Petitioner and the Re-

spondent with respect to the Respondent underwriting a judgment which the Petitioner might obtain against its insured in a cause of action filed against its insured by the Petitonier in a State District Court. This matter becomes essential based upon the Petitioner's alternative pleading of estoppel. The evidence in the case supports the finding of the jury that Respondent's attorney was its attorney during these negotiations. This is further supported by the exhibits attached hereto as F, G, H and I which the Petitioner requested that the Court of Appeals take judicial knowledge of.

3. The question presented under this paragraph is whether or not the United States Court of Appeals acquired jurisdiction over this case in view of the fact that Respondent's Motion for Judgment notwithstanding verdict had not been acted upon by the Trial Court and was still pending at the time this matter was appealed and at the present time is still pending before the Trial Court. On September 19, 1967, the jury returned a verdict in favor of the Petitioner in the amount of $16,345.78 and the Court thereafter awarded attorney fees in the amount of $5,448.60. On October 13, 1967, the Respondent filed its Motion for Judgment notwithstanding the verdict. On January 26, 1968 judgment was entered by the Trial Court in favor of the Petitioner in accordance with the verdict of the jury. On February 6, 1968, the Respondent filed its Motion for New Trial which was overruled by order of the Trial Court entered on February 26, 1968. Thereafter on March 19, 1968, the Respondent gave notice of appeal from the judgment entered on Jan-

uary 26, 1968, and the order overruling its Motion for New Trial. No action has been taken on the Respondent's Motion for Judgment notwithstanding the verdict and therefore there was lacking a final decision necessary to appelate jurisdiction. *Green v. Reading Co.*, 180 F. 2d 149 (3rd Cir. 1950); *Fast, Inc., v. Shaner*, 181 F. 2d 937 (3rd Cir. 1950); *Healey v. Pennsylvania Railroad*, 181 F. 2d 934 (3rd Cir. 1950); and *Smith v. Insurance Company of North America*, 213 F. Supp. 674 (MD Tenne. 1962).

4. The point under this paragraph is whether or not the United States Court of Appeals, Fifth Circuit, had authority to reverse this case with instruction to enter judgment for Respondent when there had been no Action upon the Respondent's Motion for Judgment notwithstanding the verdict. This Court has denied the United States Court of Appeals of such authority. *Cone v. West Virginia Pulp & Paper Company*, 330 U.S. 212, 67 S. Ct. 752 (S. C. 1947).

The action of the United States Court of Appeals, Fifth Circuit, with respect to propositions 1, 3 and 4 is contrary to the rules of law announced by this Court and also the other United States Court of Appeals. The action of the United States Court of Appeals, Fifth Circuit, on point 2 is one of interpretation; however, we believe the Court to be in error in its holding. It is the further position of the Petitioner that United States Court of Appeals, Fifth Circuit, has decided propositions 1, 3 and 4 in such a way that it conflicts with the decisions of the other United States Court of Appeals and of this Court and has departed so far from the accepted and usual course of judicial proceedings as to warrant this

Honorable Court to grant the Petition for Certiorari to reverse the decision of the United States Court of Appeals, Fifth Circuit, and affirm the judgment of the Trial Court or in the alternative to render judgment that the United States Court of Appeals, Fifth Circuit, was without jurisdiction and remand this case to the Trial Court for hearing on Respondent's Motion for Judgment notwithstanding the verdict, or further in the alternative in the event the judgment of the United States Court of Appeals, Fifth Circuit, is affirmed to reverse that part of its judgment directing the district to enter judgment for the Defendant, but remand same with instructions to grant the Respondent's Motion for New Trial.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

JACK G. NEAL,
Box 148,
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ARTIE P. STEPHENS,
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Sulphur Springs, Texas.

Artie P. Stephens

Artie P. Stephens

A copy of the foregoing Petition for Writ of Certiorari was furnished Counsel for Respondent, Mr. Don W. Davis, by mailing same to him, postage prepaid, at his address at 830 Mercantile Bank Building, Dallas, Texas 75201.

Artie P. Stephens

Artie P. Stephens

A copy of the foregoing Petition for Writ of Certiorari was furnished Counsel for Respondent, Mr. Don W. Davis, by mailing same to him, postage prepaid, at his address at 800 Mercantile Bank Building, Dallas, Texas 75201.

Artie P. Stapleton

Artie P. Stapleton

APPENDIX

EXHIBIT A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26241

GENERAL INSURANCE COMPANY OF AMERICA,
Appellant,

versus

UNITED STATES for the Use of
AUDLEY MOORE & SON,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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(January 21, 1969)

Before ALDRICH,* GODBOLD and DYER,
Circuit Judges

GODBOLD, Circuit Judge: Sulphur Springs, Texas has a new post office and federal building, and Audley Moore & Son, as a subcontractor of Professional Constructors, helped build it. Moore, not having been paid, made proper demand on Professional on May 4, 1966 for payment for labor and materials furnished. Pay-

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*Of the First Circuit, sitting by designation.

ment was not made. This Miller Act case, 40 U.S.C.A. § 270a *et seq.*, against General Insurance Company of America as surety on Professional's payment bond was filed April 20, 1967.

The primary issue on appeal, which is dispositive of the case, is whether the claim was barred by the statute of limitations in the Act.[1] The trial judge overruled this defense and submitted the case to the jury, which returned a general verdict for appellee for the amount claimed.[2] The crux of the case is a determination of when the "last of the labor was performed or material was supplied."

It is undisputed that the only thing done by Moore after April 2, 1966 was to take final measurements and to make a final inspection pursuant to preparation of his final estimate or statement. This was done in the

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[1] 40 U.S.C.A. § 270b:

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing . . . , but no such suit shall be commenced after the expiration of one year after the day on which the last labor was performed or material was supplied by him. . . ."

[2] The trial judge charged the jury that before returning a verdict for either party they must determine the last day upon which labor or material was furnished. They were instructed that if the last day was prior to April 20 the verdict must be for the defendant; if after, they should find for the plaintiff. The judge also charged that even if they found the work was completed prior to April 20, they still could find for plaintiff if they also found that defendant was estopped from asserting the limitations defense. Since the jury returned a general verdict, we do not know which theory was the basis of the verdict.

latter part of April. All other activity had ceased and all materials had been supplied as of April 2.[3]

We conclude that the limitations period began to run on April 2, 1966. Appellee had one year from that date in which to file suit. Going on the premises to make final inspections and measurements for the purpose of preparing a final estimate or statement is insufficient

---

[3]The undisputed evidence shows that the last of fifty-five payroll statements which Moore submitted to Professional was for the period of March 31, 1966 to April 2, 1966. The only work done after that date was characterized by Mr. Moore as follows:

"Q. Mr. Moore, what was the last work that you did on the project location itself?

A. That was final clean-up.

Q. And when was this done?

A. The last day of April and part of the first day of May. I wouldn't be positive of the two days, but it was in the latter part of April or the first of May.

Q. Did you do anything else on the project at that particular time?

A. Made all my final inspection and final measurements.

Q. Now, measurements of what?

A. Field measurements of work performed, such as so many lineal feet of curb and gutter, so many square feet of sidewalks, so many square feet of asphalt pavement.

* * *

Q. . . . what work, then, did you—did your firm do, sir, after, April 2, 1966?

A. Along the latter part of April my son and I went down and made all final inspections and final measurements on the project, computing it to make a — to make a final estimate.

Q. Final inspections — final measurements?

A. To see if there was any cleaning up or anything to do to the job.

Q. Did you do any cleaning up?

A. As well as I remember, there wasn't anything to do (Excerpts from Direct and Cross Examination.)

as a matter of law to constitute supplying labor within the meaning of 40 U.S.C.A. § 270b(b). Such activity involves no more "labor" than correcting defects in prior work. Yet correction of errors has been held insufficient to extend the time for filing suit. *See United States ex rel Barney Austin v. Western Electric Co.*, 337 F.2d 568 (9th Cir. 1964); *United States ex rel Circle-L-Electric Co. v. Hyde Construction Co.*, 255 F. Supp. 335 (N.D. Okla. 1966); *United States ex rel McGregor Architectural Iron Co. v. Merritt-Chapman & Scott Corp.*, 185 F. Supp. 381 (M.D. Pa. 1960).

Appellee's theory would defeat the purpose of the 1959 amendment to section 270b(b), and restore some of the uncertainty the amendment was designed to remove.[4] Congress, by that amendment, attempted to set a specific, easily ascertainable date on which limitations begins to run. This court previously has said that the language of section 270b(b) is unambiguous and that the court must "give effect to the plain and obvious meaning of the statute without reading in or reading out." *General Electric Co. v. Southern Construction Co.*, 383 F.2d 135, 138 (5th Cir. 1967). We will not depart from that rule now.

Appellee also claimed at the trial, and submitted to the jury, that appellant was estopped from asserting limitations as a defense because: (one), by its letter dated March 28, 1967 appellant led the "plaintiff to reasonably rely that the defendant would take some

---

[4]The amendment substituted "day on which the last of the labor was performed or material was supplied by him" for "date of final settlement of such contract."

type of remedial action in seeing that plaintiff's claim was investigated and at a further date would advise him of what course of action the defendant planned to follow in connection with this claim;" (two), that appellee's attorney negotiated with the attorney for appellant about the joinder of General Insurance in a state court action but those negotiations failed and this action was instituted forthwith; (three), that a statement made in a letter from appellant's attorney to General Insurance about when the limitations period expired caused appellee to rely on that date as the date to file suit.

All of these matters are insufficient as a matter of law to create estoppel, under the circumstances of this case. The letter of March 28, 1967 is set out in the margin.[5] It contained no representations or promises which might reasonably be expected to induce reliance by Moore or his attorneys to its detriment, nor was there any deception. *McWaters & Bartlett v. United States*, 272 F.2d 291 (10th Cir. 1959).

---

[5]Dear Mr. Neal:

* * *

We acknowledge receipt of your letter dated March 21, 1967. This is the first notice we have had of such a claim.
At the present time we are asking Professional Constructors, Inc., to give us some information regarding this matter. As soon as we have heard from them we will contact you further.
Nothing in this letter should be deemed a waiver by the General Insurance Company of America of any of the terms and conditions of its bond.

Yours Very Truly,
L. L. Launsbury
Surety Claims

As for the other two bases of appellee's claim of estoppel, it need only be pointed out that the record shows conclusively that at the time of the alleged negotiations and the letter to General Insurance the attorney that appellee asserts was appellant's counsel was at that time counsel for Professional Constructors only. It was not until a later date that he undertook representation of General Insurance.

The district court is REVERSED with directions to enter judgment for appellant.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

EXHIBIT B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26241

GENERAL INSURANCE COMPANY OF AMERICA,
Appellant,

versus

UNITED STATES for the Use of
AUDLEY MOORE & SON,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas

---

(April 4, 1969)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before ALDRICH,* GODBOLD and DYER, Circuit Judges.

PER CURIAM: In our original opinion we held that appellee's going on the premises to make final in-

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*Of the First Circuit, sitting by designation.

spections and to take measurements for the purpose of preparing his final estimate was insufficient to constitute supplying labor [in the prosecution of the work] within the meaning of 40 U.S.C.A. § 270b (b). The visit to the premises by appellant occurred in late April or early May. His activity on the premises had ceased for several weeks. His final payroll had been submitted for the period ending April 2.

Appellee advances the theory that the taking of measurements, and the subsequent preparation of the final estimate on May 4, constituted supplying labor in the prosecution of the work, by reason of a general provision of the contract that "on the 25th of each month * * * * subcontractor shall submit to the contractor an estimate of material on hand and work done." The gist of appellee's argument is that anything which he did in compliance with the terms of his contract constituted furnishing labor in the prosecution of the work, and until he discharged his every legal duty under the contract the statute of limitations did not begin to run.[1] Labor furnished in the prosecution of the work is not co-terminous with the outer limits of all duties provided by the contract.

---

[1] Without attempting a definitive list we point out that the contract required appellee to furnish partial releases and partial waivers of liens from his materialmen and creditors as from time to time requested by the prime contractor, to furnish final releases and waivers of liens at the time of final payment, to pay unemployment and retirement taxes (state and federal), and to defend against claims arising from the agreement. The performance of any or all of these obligations can occur after appellee's work is complete and can require expenditure of time and effort by him.

Our original opinion referred, by way of analogy, to the principle that correction of errors does not extend the time for filing suit. In his petition for rehearing appellee directs us to the per curiam opinion in *Trinity Universal Ins. Co. v. Girdner*, 379 F.2d 317 (5th Cir. 1967), which states that the language in 40 U.S.C.A. § 270b (b) "is broad enough to include work performed upon the demand of the government to correct defects in the work as originally completed." *Id.* at 318. We consider *Trinity*. In that case the inspector refused to approve the original work unless defective parts were replaced. This is to be distinguished from the situation in which labor is supplied or material furnished to correct defects after the work has been completed.

Appellee's other assertions of error also are without merit.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (FRAP 35; Local Fifth Circuit R. 12), the Petition for Partial Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

EXHIBIT C

§ 270b. Same; rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor wthin ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy

in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit. As amended Aug. 4, 1959, Pub. L. 86-135, § 1, 73 Stat. 279.

EXHIBIT D

Rule 50. Motion for a Directed Verdict

(b) Motion for Judgment Notwithstanding the Verdict.

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

EXHIBIT E

Rule 59. New Trials; Amendment of Judgments.

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

EXHIBIT F

FILED
Nov 22 1966
James R. Cooney, Clerk U. S. Dist. Court
By [illegible] Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

UNITED STATES OF AMERICA for the use of LARICH, INC., a corporation	:	
VS.	:	CIVIL ACTION NO. 1002
PROFESSIONAL CONSTRUCTORS, INC., a corporation and GENERAL INSURANCE COMPANY OF AMERICA, a corporation	:	

ANSWER OF DEFENDANTS PROFESSIONAL CONSTRUCTORS, INC. AND GENERAL INSURANCE COMPANY OF AMERICA

Defendants Professional Constructors, Inc. and General Insurance Company of America, for answer to the complaint, say:

1. Answering the first paragraph of the complaint, Defendants state that they have no knowledge relative to the truth or falsity of the allegations therein contained.

2. Answering the second paragraph of the complaint, Defendants admit the allegations therein contained.

3. Answering the third paragraph of the complaint, Defendants admit the allegations therein contained.

4. Answering the fourth paragraph of the complaint, Defendants deny that this court has jurisdiction of the cause of action asserted in the complaint on file herein.

5. Answering the fifth paragraph of the complaint, Defendants admit the allegations therein contained.

A TRUE COPY I CERTIFY
JAMES R. COONEY, CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
BY [signature] Deputy

6. Answering the sixth paragraph of the complaint, Defendants admit the allegations therein contained, except that they deny that said paragraph correctly alleges the condition of said payment bond.

7. Answering the seventh paragraph of the complaint, Defendants deny that Larich, Inc. and Professional Constructors, Inc. entered into a contract "to furnish labor and material and to prosecute the work provided for in the principal contract heretofore described ...".

8. Answering the eighth paragraph of the complaint, Defendants admit that Larich, Inc. furnished certain labor and material relative to the performance of the work provided for in the subcontract, but deny that all of the labor and materials which Larich, Inc. was obligated to furnish under subcontract were properly and/or timely furnished or done by Larich, Inc., and deny that all obligations of Larich, Inc. under said subcontract have been performed, and deny that they are indebted to Larich, Inc. relative to said subcontract in the sums alleged in said paragraph of such complaint, and deny that they have refused payment of sums properly owing under said subcontract to Larich, Inc.

9. For a first, separate and distinct defense, Defendants allege that a substantial portion of the labor and materials which Larich, Inc. was obligated to furnish upon such project under said subcontract was not properly and timely furnished or performed, as a consequence whereof Professional Constructors, Inc. has sustained substantial loss and expense, all of which should be charged to Larich, Inc.

10. For a second, separate and distinct defense, Defendants allege that the facts alleged in said complaint are insufficient to state a claim

upon which relief can be granted.

11. For a third, separate and distinct defense, Defendants allege that Larich, Inc. employed a subcontractor, to-wit, Hankins Electric Company and H & H Constructors, Inc. who did not properly finish the work and labor which they were obliged to perform under such subcontract, and that consequently Defendant Professional Constructors, Inc. was forced to take over that portion of the work done by Larich, Inc.'s said subcontractor, and obliged to finish same, at great additional costs, all of which should be back charged to Larich, Inc. and deducted from any sum recovered by them in this suit.

12. For a fourth, separate and distinct defense, Defendants would show that the aforesaid subcontractor of Larich, Inc., to-wit Hankins Electric or H & H Constructors, Inc., wrongfully instituted action in the District Court in Sulphur Springs, Texas, which Professional Constructors, Inc. was obliged to defend, at great costs to itself, all of which should be back charged to Larich, Inc. and deducted from any sums ultimately recovered by it herein.

13. For a fifth, separate and distinct defense, Defendants would show that there are certain well defined and accepted back charges under the subcontract which Larich, Inc. has sued upon herein, many of which have previously been accepted by Larich, Inc., but which Larich, Inc. now wrongfully fails to recognize, that there are other back charges properly attributable to Larich, Inc., all of which should be charged to and deducted from any sums which Professional Constructors, Inc. may lawfully owe Larich, Inc.

14. For a sixth, separate and distinct defense, Defendants allege that the subcontract agreement provides in paragraph 27 thereof that the "prevailing party shall be entitled to have in the judgment an award of reasonable attorneys' fees incurred in connection with said action; that under the terms of paragraph 27 Defendants are entitled to an award of reasonable attorneys' fees, which they allege to be the sum of $2,500.00; that such sum should be deducted from any sums found to be owing herein to Larich, Inc. on said contract.

WHEREFORE, Defendants pray judgment that Plaintiff's complaint be dismissed with costs to Defendants; in the alternative that as to any monies which are lawfully due and payable to Plaintiff, upon their determination an attorneys' fee in behalf of Defendants be awarded and deducted from the monies so owing, with costs to Plaintiff.

DATED: November 21, 1966.

IRION, CAIN, COCKE AND MAGEE

BY Don W. Davis
Don W. Davis
830 Mercantile Bank Building
Dallas, Texas 75201 RI 7 3567
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of November, 1966, a true copy of the above and foregoing answer of Defendants Professional Constructors, Inc. and General Insurance Company of America was served upon Plaintiff Larich, Inc. by depositing same in the United States mail, postage prepaid, properly addressed to Hayes McClerkin, 320 State National Bank Building, Texarkana, Arkansas 75501, attorney of record for Plaintiff.

Don W. Davis
Don W. Davis

EXHIBIT G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

UNITED STATES OF AMERICA for the use of LARICH, INC., a corporation	:	
VS,	:	CIVIL ACTION NO. 1002
PROFESSIONAL CONSTRUCTORS, INC., a corporation and GENERAL INSURANCE COMPANY OF AMERICA, a corporation	:	

DEMAND FOR TRIAL BY JURY

TO: Hayes McClerkin, Attorney for Plaintiff
Address: 320 State National Bank Building
Texarkana, Arkansas

Defendants Professional Constructors, Inc. and General Insurance Company of America hereby demand trial by jury of all issues in the above entitled action:

Dated December 1, 1966.

IRION, CAIN, COCKE AND MAGEE

Don W. Davis

Don W. Davis, Attorney for Defendants
Address: 830 Mercantile Bank Building
Dallas, Texas 75201

FILED
Dec 14 1966
U. S. Court
DEPUTY

A TRUE COPY I CERTIFY
JAMES R. COONEY, CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
BY Myra Barton
Deputy

EXHIBIT H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

FILED
— M. Feb 9 1967
James R. Cooney, Clerk, U. S. Court
By Mary O Prater
DEPUTY

UNITED STATES OF AMERICA
for the use of LARICH, INC.,
a corporation

VS.

PROFESSIONAL CONSTRUCTORS,
INC., a corporation and GENERAL
INSURANCE COMPANY OF AMERICA,
a corporation

CIVIL ACTION NO. 1002

JOINT MOTION FOR CONTINUANCE

NOW COMES, all the parties in the above styled and numbered cause and move the Court to enter an Order continuing the above case until the October Term of said Court for the reason that this suit involves a very complicated series of events and financial transactions, for the full discovery of which council have not yet had sufficient time to develop; the parties hereto would ask this Honorable Court that this cause be continued for the additional reason that Mr. Hayes McClerkin, lead council for the Plaintiffs, is a member of the Arkansas Legislature which is now and will be in session until the middle of March, 1967.

DATED, This _____ day of February, 1967.

SMITH, SANDERSON, STROUD & McCLERKIN
State First National Bank Building
Texarkana, Arkansas
Attorneys for Larich, Inc.

By: Hayes McClerkin
Hayes McClerkin

WHEELER, WATKINS, HUBBARD, PATTON & PEEK
Texarkana National Bank Building
Texarkana, Texas
Attorneys for Larich, Inc.

By: Jerry A. Rochelle
Jerry A. Rochelle

IRION, CAIN, COCKE & MAGEE
830 Mercantile Bank Building
Dallas, Texas
Attorneys for Professional Constructors, Inc.

By: Don W. Davis
Don W. Davis

A TRUE COPY I CERTIFY
JAMES R. COONEY, CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
BY Myra Barton
Deputy

EXHIBIT I

FILED
AUG 29 1967
M.
James R. Cooney, Clerk, U. S. Court
By Augustine Starnes
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

UNITED STATES OF AMERICA FOR THE USE OF LARICH, INC., a corporation	0	Civil Action No. 1002
VS.	0	MOTION TO DISMISS
PROFESSIONAL CONSTRUCTORS, INC., a corporation, and GENERAL INSURANCE COMPANY OF AMERICA, a corporation	0	

Larich, Inc., a corporation, alleges that all matters in controversy in the above entitled and numbered cause have been fully, finally and completely settled and adjusted, and consequently said cause should be dismissed, with prejudice, at cost of the defendant, Professional Constructors, Inc. whose counsel joins in this motion to evidence its agreement to said disposition.

Dated: August 28, 1967

SMITH, SANDERSON, STROUD & McCLERKIN

By: [signature]

Attorneys for Plaintiff, Larich, Inc.
320 State National Bank Building
Texarkana, Arkansas

IRION, CAIN, COCKE, MAGEE AND DAVIS

By: [signature]

Attorneys for Professional Constructors, Inc., and General Insurance Company of America
830 Mercantile Bank Building
Dallas, Texas

A TRUE COPY I CERTIFY
JAMES R. COONEY, CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
BY [signature]
Deputy

D-1

SUPREME COURT, U. S.

FILED

OCT 27 1969

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 310

AUDLEY MOORE & SON,

Petitioners,

v.

GENERAL INSURANCE COMPANY OF AMERICA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

IRION, CAIN, MAGEE AND DAVIS,
830 Mercantile Bank Building,
Dallas, Texas 75201.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10543 — 1455 ROUND TABLE DRIVE — DALLAS — ME 1-3130

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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 310

AUDLEY MOORE & SON,

Petitioners,

v.

GENERAL INSURANCE COMPANY OF AMERICA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Mr. Justice Burger, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

Petitioner Audley Moore & Son originally filed this action in the United States District Court for the Eastern Dis-

trict of Texas, on April 20, 1967, under the provisions of 40 U.S.C.A. 270A, the Miller Act, against respondent, surety upon a prime contractor's payment bond. The prime contractor, Professional Constructors Inc., had contracted with General Services Administration to build a post office in Sulphur Springs, Texas. One of the subcontracts made by the prime contractor was entered into with petitioner on March 8, 1965 (plaintiff's Exhibit 1), such subcontract forming the basis of the petitioner's complaint. Such complaint alleged an indebtedness owing petitioner of $16,345.78. Respondent's defense, which was upheld by the United States Court of Appeals, Fifth Circuit, was that petitioner's complaint was barred by the Miller Act's limitation provisions:

> (40 U.S.C.A. 270b (b)): "* * *but no such suit shall be commenced after the expiration of one year after the day on which the last labor was performed or material was supplied by him * * *"

As stated in the opinion of the Court of Appeals (admitted by petitioner) "It is undisputed that the only thing done by Moore after April 2, 1966 was to take final measurements and to make a final inspection pursuant to preparation of his final estimate or statement. This was done in the latter part of April. All other activity had ceased and all materials had been supplied as of April 2."

In other words, *more than one year* prior to filing suit, *all contractual labor had been performed and all required material* delivered and installed. All of the labor that General Services Administration required to be done, and the subcontract set forth, had been *finished*. Petitioner's admitted

sole activity was his self-serving ministrations to enable him to bill the prime contractor for his services. All the labor he agreed to render was done, and all the materials he agreed to furnish had been supplied by April 2, 1966; suit was filed April 20, 1967.

ARGUMENT

1. Petitioner's "Question 1" attacks the holding of the Court of Appeals that "Going on the premises to make final inspections and measurements *for the purpose of* preparing a final estimate or statement is insufficient as a matter of law to constitute supplying labor within the meaning of 40 U.S.C.A. 270(b)". (Emphasis added) In the face of this holding, the only argument advanced to this court by petitioner is that the Miller Act should be given a "broad" and "liberal" interpretation, to the end that since the subcontract requires petitioner to bill the contractor upon completion of the job based upon the subcontractor's estimates, *if the subcontractor actually goes to the job-site* and makes measurements, then that activity constitutes the performance of "labor" within the meaning of 40 U.S.C.A. 270(b). There is no reported case in which the performance of such an activity has been held to constitute "labor" within such statute.

The absurdity of petitioner's line of reasoning is manifest. There are many provisions in the subcontract here in-

volved which impose a duty upon one or both of the parties. The Court of Appeals succinctly stated the impossibility of adopting petitioner's construction of the Miller Act:

> "The gist of appellee's argument is that anything which he did in compliance with the terms of his contract constituted furnishing labor in the prosecution of the work, and until he discharged his every legal duty under the contract the statute of limitations did not begin to run. Labor furnished in the prosecution of the work is not coterminous with the outer limits of all duties provided by the contract. Without attempting a definitive list we point out that the contract required appellee to furnish partial releases and partial waivers of liens from his materialmen and creditors as from time to time requested by the prime contractor, to furnish final releases and waivers of liens at the time of final payment, to pay unemployment and retirement taxes (state and federal), and to defend against claims arising from the agreement. The performance of any or all of these obligations can occur after appellee's work is complete and can require expenditure of time and effort by him."

None of the cases cited by petitioner have anything to do with his proposition that engaging in any activity required by contractual provisions prevents running of limitations. *U. S. for the Use of Sherman et al v. Carter*, 353 U.S. 210, 77 S. Ct. 793, arose at a time when the former provisions of sec. 270(b) provided:

> "* * * no such suit shall be commenced after the expiration of one year after the date of final settlement of the contract."

The reasons for amendment of the section so as to change the requirement from "date of final settlement" to the present criteria will be discussed below. In this case, the trustees of a health and welfare fund sued the surety for contri-

butions to that fund which the contractor failed to make, but which he had been obligated to pay under a subcontract. The money sued for was 7½ cents per hour worked by certain construction employees; that money was a part of the contractual rate paid for the labor involved. There was no issued involved relative to whether certain contractual activity was or was not labor within the meaning of the limitations section of the Miller Act, and there could not be, inasmuch as sec. 270b *did not then contain the present language*, but simply provided for measurement from "*the date of final settlement of the contract*". The case is wholly foreign to the question at hand.

Another of petitioner's "liberal construction" cases which he cites is *U. S. for Use of Westinghouse Electric Supply Company v. Enderbrock-White Company*, 275 F. 2d 57; it does not even deal with the limitations provision, but instead is concerned only with the *notice* section, 270(a), required of remote subcontractors! Again, it arose prior to the 1959 amendment of 270(b), when that section referred only to "final settlement". The case is also concerned only with material supplied, and not labor; the question in the case is answered by the court at p. 60:

> "We hold that in order to recover under the Miller Act, it is not required of the materialman that he prove that his materials were actually used in the prosecution of the work of the prime contract, but only that in good faith he reasonably believed that the materials were so intended."

Thus, again, petitioner's reference to this case is a waste of time.

The *Westinghouse* case, supra, cites as does petitioner, *U. S. for Use of J. B. Byrne & Co. v. Fire Assn. of Philadelphia*, 260 F. 2d 541. It is difficult to conceive how petitioner can, in good faith, contend that this case has any relation whatsoever to the issues at hand. The facts arose *prior* to the 1959 amendment of sec. 270b(b); did *not* deal with limitations in any way; did *not* involve "labor" or a definition of labor for any purpose, but instead, under the peculiar facts there, whether tires consumed on the job constituted material supplied within the act.

The cited case of *U. S. for use of Austin v. Western Electric Co.*, 337 F. 2d 568 simply reverses a summary judgment and remands for trial because the court found that a fact issue existed as to the date on which the last of the subcontract work was actually completed (not substantially completed), noting various activity pursuant to a "punch list" which might be original contract labor (overlooked earlier) instead of "corrections, repairs and cleanup" (the later category is held not to constitute labor for sec. 270b(b) limitations purposes. There was no question involved of whether activity such as making estimates, sending bills or other contractual activity, as distinguished from the labor on the project, had any relevance to sec. 270b(b) limitations.

We might pause to cite further general language in the *Austin* case, supra, in view of petitioner's repetitive citation of general language espousing the liberal construction of the Miller Act (at p. 572):

> "The Miller Act is entitled to a liberal construction and application in order properly to effectuate the Congres-

> sional intent to protect those whose labor and materials go into public projects. * * * *But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds.*' (emphasis added) *Clifford F. MacEvoy Co. v. U. S.*, 1944, 322 U.S. 102, 64 S. Ct. 890; *U. S. v. Carter*, 353 U.S. 210, 77 S. Ct. 793; *Apache Powder Co. v. Ashton Co.*, 264 F. 2d 417."

Petitioner also cites the old case of *Glassell-Taylor Co. v. Magnolia Petroleum Co.*, 153 F. 2d 527 (1946), apparently for additional general language therein speaking of "remedial nature" and "liberal construction". There, again, the court was dealing with the pre-amendment version of sec. 270b(b), and the issue was not whether contractual duties could be considered as "labor", but whether the subcontractor's charges for gasoline and oil used in delivering material to the job-site could be recovered under the Miller Act. Neither this case nor the ones above analyzed are of the remotest application to the issue in the case at bar.

As noted hereinabove, sec. 270b(b) was amended; it formerly provided:

> "* * * but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract."

The amendment to its present verbiage occurred in 1959; its obvious purpose was to obviate the inherent confusion in determination of "date of final settlement." The U.S. District Court, in *Travis Equipment Co. v. D & L Construction Co.*, 224 F. Supp. 410 (1963), observed in this regard:

> "Senate Report No. 551 of the 86th Congress — 1959 — attached and incorporated a letter of February 24, 1959

of the Comptroller General of the United States in support of its recommendation of the 1959 amendment to the Miller Act. That letter set forth the complications that had resulted from the use of the 'final settlement' language that had been incorporated into the Miller Act from the earlier Heard Act. It also pointed out the administrative burdens and practical uncertainties that resulted from the former requirement of the Miller Act which required the Comptroller General to conclusively fix the date of final settlement. * * *

"And in our determination of Congressional intent, we must also take into account that one of the 'beneficial results'—was, as the Comptroller General's letter pointed out, that the supplier would know simply by consulting his records the precise time when the 1-year limitation began to run and (by adding 1 year) when his right to sue would expire."

General Electric Co. v. Southern Construction Co., 383 F. 2d 135 (1967, 5th Circuit) held:

"As we view Section 270(b), there is nothing ambiguous or doubtful about the language, 'after the expiration of one year after the day on which the last of the labor was performed or material was supplied' by the claimant—The court must give effect to the plain and obvious meaning of the statute without reading in or reading out."

To allow a subcontractor to *delay the running of such period by the technique of walking around the job, and preparing his final bill would be to "read in" or "read out"* — to amend the statute. Thus amended, the statute might provide:

"* * * after the expiration of one year after the day the claimant made his final inspection";

Or, would petitioner like this wording better:

"* * * after the expiration of one year after the day claimant complies with the contractual provision relative to furnishing final estimate";

Or:

"* * * after the expiration of one year after the day on which claimant sends his final bill".

The courts have consistently applied the plain words of statutes so as to protect those parties for whose benefit such statutes were designed. In the case at bar, as seen above, the plain words of Section 270b(b) will simply not stretch far enough to allow petitioner one year and eighteen days in which to file his suit — April 2, 1966 to April 20, 1967. There is no room in the Miller Act for this type of sophistry and dissimulation. The 1959 Amendment allows a subcontractor to precisely determine his rights, by simply noting the last day he performed labor or furnished material. The record unequivocally establishes that appellee's "last work" and "last materials" were performed and furnished, on or before April 2, 1966. As held by the Fifth Circuit:

> "Petitioner's theory would defeat the purpose of the 1959 amendment to Section 270b(b) and restore some of the uncertainty the amendment was designed to remove. Congress, by that amendment. attempted to set a specific, easily ascertainable date on which limitations begins to run. This court previously has said that the language of Section 270b(b) is unambiguous and that the court must 'give effect to the plain and obvious meaning of the statute without reading in or reading out.' *General Electric Co. v. Southern Construction Co.*, 383 F. 2d 135, 138 (5th Cir. 1967). We will not depart from that rule now."

Respondent submits that the circuit court's opinion adopting its position is sound, states what the law is and what

the law should be. "Labor" should be construed to be those activities of the subcontractor which accomplish the construction project. To adopt petitioner's theory would result in total uncertainty in commencement of the one-year period, and would allow any activity referred to or required by contract to postpone commencement of limitations. The numerous requirements and activities required by the provisions on the reverse side of petitioner's subcontract — petitioner's Exhibit 1 — could be done at various times after the last project labor was supplied and material furnished. The construction adopted by the circuit court allows a full year, commencing from an easily ascertainable date.

2. Petitioner's "Question 2" is so brief and vague as to be virtually unintelligible. Apparently, petitioner is contending that if respondent's attorney represented it in another suit unconnected with the case at bar — *U. S. for use of Larich, Inc. v. Professional Constructors and General Insurance Company of America*, No. 1002 in the U. S. District Court for the Eastern District of Texas, then he somehow became, *eo instante*, counsel for General Insurance Company in *this case*, which had *not yet been filed* in the U. S. District Court. The role of non-existent counsel in a non-existent case seemingly supplies some defect in petitioner's theory of estoppel, but whether that be the element of misrepresentation, reliance or damage, we are not advised. We are tantalized by petitioner's mysterious statement in his brief, at p. 15 (in the 15 lines devoted to "estoppel") that "the evidence in the case supports the finding of the jury, that respondent's attorney was its attorney during these negotiations". Since we

are not favored with an analysis or explanation of petitioner's theory, we shall be content with the circuit court's statement relative to "estoppel":

> "Appellee also claimed at the trial, and submitted to the jury, that appellant was estopped from asserting limitations as a defense because: (one), by its letter dated March 28, 1967 appellant led the 'plaintiff to reasonably rely that the defendant would take some type of remedial action in seeing that plaintiff's claim was investigated and at a further date would advise him of what course of action the defendant planned to follow in connection with this claim;' (two), that appellee's attorney negotiated with the attorney for appellant about the joinder of General Insurance in a state court action but those negotiations failed and this action was instituted forthwith; (three), that a statement made in a letter from appellant's attorney to General Insurance about when the limitations period expired caused appellee to rely on that date as the date to file suit.
>
> "All of these matters are insufficient as a matter of law to create estoppel, under the circumstances of this case. The letter of March 28, 1967 is set out in the margin. It contained no representations or promises which might reasonably be expected to induce reliance by Moore or his attorneys to its detriment, nor was there any deception. *McWaters & Bartlett v. United States*, 272 F. 2d 291 (10th Cir. 1959)."

No deception, misrepresentation or reliance can be found in the record, and the point is wholly without substance.

3. Petitioner's questions 3 and 4 are frivolous, and presented here for the first time. The four cases cited under question 3 deal with the situation where a motion for judgment NOV or for new trial are filed *after* entry of judgment,

and not disposed of by an order. Here, on October 13, 1967, respondent filed its Motion for Judgment NOV. Thereafter, on January 26, 1968 judgment was entered by the trial court in behalf of petitioner, which action obviously overruled and disposed of respondent's pending motion. We are thus at a loss to follow petitioners argument that somehow the motion for judgment filed October 13, 1967 is still undecided, notwithstanding judgment having been entered January 26, 1968, and motion for new trial having been overruled by order entered February 26, 1968. There is no requirement in the Federal Rules of Civil Procedure that a judgment state that it overrules pending motions; obviously it does so automatically.

We do observe the following guiding principles, from *Cyclopedia of Federal Procedure*, sec. 57.12:

> "Although from the earliest days of the federal courts the statutes have laid down the requirement of a final judgment or decision as a prerequisite to review, they have contained no definition of the term, leaving it to be drawn from statutory construction by common law principles and from implications yielded by other statutes.
>
> General statements by way of definition of the terms "final decision" and "final judgment" have been numerous, making, in the long run, for confusion by reason of their differences of phraseology and emphasis. A final judgment, it is sometimes said, is one that puts an end to the controversy between the parties litigant, disposing of the whole merits of the controversy or of some independent, unrelated portion thereof, leaving nothing to be done but to enforce by execution what has been

determined. Stated in another way, a judgment is final for the purpose of appeal when it terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined; so that if there should be an affirmance by the reviewing court, the court below would have nothing to do but to execute the judgment or decree it had already rendered. In short, a final and appealable adjudication is one which involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief, except by recourse to an appeal."

Sec. 57.14:

"As appears from the discussion in subsequent sections, many factors enter into the finality of a judgment or decision. The words 'final decision,' as used in a statute, are given a liberal and reasonable construction. In determining whether a judgment or decision is final, the federal courts regard substance rather than form and are guided by practical rather than theoretical considerations. Whether a final judgment has been rendered depends primarily upon the intention of the court as gathered from the record as a whole, illumed to some extent by local rule or practice."

Sec. 57.17:

"The finality of an order depends, not upon its name, its property, or its normal function, but upon whether it disposes of the whole case on its merits so that the court has nothing to do but to execute the judgment or decree already rendered. The form of the judgment is not necessarily determining, as, conceivably, it may constitute a final decree although interlocutory in form or time. Whether or not a judgment is final is to be determined by the force of the decision itself, and not by contingencies outside the record, by the essence of what is done, and not by the appellation given the decision by the court rendering it."

The judgment, which appears at p. 76, transcript, recites:

> "It is ORDERED AND ADJUDGED that the Plaintiff, Audley Moore & Son, recover of the defendant, General Insurance Company of America the sum of $16,345.78, plus the sum of $5,448.60 as attorneys fees, totaling $21,794.38, with interest thereon at the rate of 6% as provided by law, and cost of action."

Certainly, nothing could be more of a final disposition of the entire controversy between the parties. The only motion filed thereafter was duly overruled by order entered February 26, 1969 (Tr. p. 81).

7

CONCLUSION

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals is correct, that this case is not a proper one for review by certiorari in this court, and that the petition for a writ of certiorari should be denied.

Dated October 20, 1969.

IRION, CAIN, MAGEE AND DAVIS,
830 Mercantile Bank Building,
Dallas, Texas 75201.

M. R. Irion

Don W. Davis
Attorneys for Respondent.

CERTIFICATE OF SERVICE

Service on counsel for petitioner Artie P. Stephens has been made by placing a copy of the foregoing brief in opposition in the U. S. mail, postage prepaid, properly addressed to him at 110 North Davis Street, Sulphur Springs, Texas.

M. R. Irion

EXHIBIT A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26241

GENERAL INSURANCE COMPANY OF AMERICA,
Appellant,

versus

UNITED STATES for the Use of
AUDLEY MOORE & SON,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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(January 21, 1969)

Before ALDRICH,* GODBOLD and DYER,
Circuit Judges

GODBOLD, Circuit Judge: Sulphur Springs, Texas has a new post office and federal building, and Audley Moore & Son, as a subcontractor of Professional Constructors, helped build it. Moore, not having been paid, made proper demand on Professional on May 4, 1966 for payment for labor and materials furnished. Pay-

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*Of the First Circuit, sitting by designation.

ment was not made. This Miller Act case, 40 U.S.C.A. § 270a *et seq.*, against General Insurance Company of America as surety on Professional's payment bond was filed April 20, 1967.

The primary issue on appeal, which is dispositive of the case, is whether the claim was barred by the statute of limitations in the Act.[1] The trial judge overruled this defense and submitted the case to the jury, which returned a general verdict for appellee for the amount claimed.[2] The crux of the case is a determination of when the "last of the labor was performed or material was supplied."

It is undisputed that the only thing done by Moore after April 2, 1966 was to take final measurements and to make a final inspection pursuant to preparation of his final estimate or statement. This was done in the

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[1] 40 U.S.C.A. § 270b:

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing . . . , but no such suit shall be commenced after the expiration of one year after the day on which the last labor was performed or material was supplied by him. . . ."

[2] The trial judge charged the jury that before returning a verdict for either party they must determine the last day upon which labor or material was furnished. They were instructed that if the last day was prior to April 20 the verdict must be for the defendant; if after, they should find for the plaintiff. The judge also charged that even if they found the work was completed prior to April 20, they still could find for plaintiff if they also found that defendant was estopped from asserting the limitations defense. Since the jury returned a general verdict, we do not know which theory was the basis of the verdict.

latter part of April. All other activity had ceased and all materials had been supplied as of April 2.[3]

We conclude that the limitations period began to run on April 2, 1966. Appellee had one year from that date in which to file suit. Going on the premises to make final inspections and measurements for the purpose of preparing a final estimate or statement is insufficient

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[3]The undisputed evidence shows that the last of fifty-five payroll statements which Moore submitted to Professional was for the period of March 31, 1966 to April 2, 1966. The only work done after that date was characterized by Mr. Moore as follows:

"Q. Mr. Moore, what was the last work that you did on the project location itself?

A. That was final clean-up.

Q. And when was this done?

A. The last day of April and part of the first day of May. I wouldn't be positive of the two days, but it was in the latter part of April or the first of May.

Q. Did you do anything else on the project at that particular time?

A. Made all my final inspection and final measurements.

Q. Now, measurements of what?

A. Field measurements of work performed, such as so many lineal feet of curb and gutter, so many square feet of sidewalks, so many square feet of asphalt pavement.

. . .

Q. . . . what work, then, did you—did your firm do, sir, after, April 2, 1966?

A. Along the latter part of April my son and I went down and made all final inspections and final measurements on the project, computing it to make a — to make a final estimate.

Q. Final inspections — final measurements?

A. To see if there was any cleaning up or anything to do to the job.

Q. Did you do any cleaning up?

A. As well as I remember, there wasn't anything to do (Excerpts from Direct and Cross Examination.)

as a matter of law to constitute supplying labor within the meaning of 40 U.S.C.A. § 270b(b). Such activity involves no more "labor" than correcting defects in prior work. Yet correction of errors has been held insufficient to extend the time for filing suit. *See United States ex rel Barney Austin v. Western Electric Co.*, 337 F.2d 568 (9th Cir. 1964); *United States ex rel Circle-L-Electric Co. v. Hyde Construction Co.*, 255 F. Supp. 335 (N.D. Okla. 1966); *United States ex rel McGregor Architectural Iron Co. v. Merritt-Chapman & Scott Corp.*, 185 F. Supp. 381 (M.D. Pa. 1960).

Appellee's theory would defeat the purpose of the 1959 amendment to section 270b(b) and restore some of the uncertainty the amendment was designed to remove.[4] Congress, by that amendment, attempted to set a specific, easily ascertainable date on which limitations begins to run. This court previously has said that the language of section 270b(b) is unambiguous and that the court must "give effect to the plain and obvious meaning of the statute without reading in or reading out." *General Electric Co. v. Southern Construction Co.*, 383 F.2d 135, 138 (5th Cir. 1967). We will not depart from that rule now.

Appellee also claimed at the trial, and submitted to the jury, that appellant was estopped from asserting limitations as a defense because: (one), by its letter dated March 28, 1967 appellant led the "plaintiff to reasonably rely that the defendant would take some

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[4]The amendment substituted "day on which the last of the labor was performed or material was supplied by him" for "date of final settlement of such contract."

type of remedial action in seeing that plaintiff's claim was investigated and at a further date would advise him of what course of action the defendant planned to follow in connection with this claim;" (two), that appellee's attorney negotiated with the attorney for appellant about the joinder of General Insurance in a state court action but those negotiations failed and this action was instituted forthwith; (three), that a statement made in a letter from appellant's attorney to General Insurance about when the limitations period expired caused appellee to rely on that date as the date to file suit.

All of these matters are insufficient as a matter of law to create estoppel, under the circumstances of this case. The letter of March 28, 1967 is set out in the margin.[5] It contained no representations or promises which might reasonably be expected to induce reliance by Moore or his attorneys to its detriment, nor was there any deception. *McWaters & Bartlett v. United States*, 272 F.2d 291 (10th Cir. 1959).

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[5]Dear Mr. Neal:

. . . .

We acknowledge receipt of your letter dated March 21, 1967. This is the first notice we have had of such a claim.

At the present time we are asking Professional Constructors, Inc., to give us some information regarding this matter. As soon as we have heard from them we will contact you further.

Nothing in this letter should be deemed a waiver by the General Insurance Company of America of any of the terms and conditions of its bond.

Yours Very Truly,
L. L. Launsbury
Surety Claims

As for the other two bases of appellee's claim of estoppel, it need only be pointed out that the record shows conclusively that at the time of the alleged negotiations and the letter to General Insurance the attorney that appellee asserts was appellant's counsel was at that time counsel for Professional Consfructors only. It was not until a later date that he undertook representation of General Insurance.

The district court is REVERSED with directions to enter judgment for appellant.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

EXHIBIT B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26241

GENERAL INSURANCE COMPANY OF AMERICA,
Appellant,

versus

UNITED STATES for the Use of
AUDLEY MOORE & SON,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(April 4, 1969)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before ALDRICH,* GODBOLD and DYER, Circuit Judges.

PER CURIAM: In our original opinion we held that appellee's going on the premises to make final in-

*Of the First Circuit, sitting by designation.

spections and to take measurements for the purpose of preparing his final estimate was insufficient to constitute supplying labor [in the prosecution of the work] within the meaning of 40 U.S.C.A. § 270b (b). The visit to the premises by appellant occurred in late April or early May. His activity on the premises had ceased for several weeks. His final payroll had been submitted for the period ending April 2.

Appellee advances the theory that the taking of measurements, and the subsequent preparation of the final estimate on May 4, constituted supplying labor in the prosecution of the work, by reason of a general provision of the contract that "on the 25th of each month * * * * subcontractor shall submit to the contractor an estimate of material on hand and work done." The gist of appellee's argument is that anything which he did in compliance with the terms of his contract constituted furnishing labor in the prosecution of the work, and until he discharged his every legal duty under the contract the statute of limitations did not begin to run.[1] Labor furnished in the prosecution of the work is not co-terminous with the outer limits of all duties provided by the contract.

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[1]Without attempting a definitive list we point out that the contract required appellee to furnish partial releases and partial waivers of liens from his materialmen and creditors as from time to time requested by the prime contractor, to furnish final releases and waivers of liens at the time of final payment, to pay unemployment and retirement taxes (state and federal), and to defend against claims arising from the agreement. The performance of any or all of these obligations can occur after appellee's work is complete and can require expenditure of time and effort by him.

Our original opinion referred, by way of analogy, to the principle that correction of errors does not extend the time for filing suit. In his petition for rehearing appellee directs us to the per curiam opinion in *Trinity Universal Ins. Co. v. Girdner*, 379 F.2d 317 (5th Cir. 1967), which states that the language in 40 U.S.C.A. § 270b (b) "is broad enough to include work performed upon the demand of the government to correct defects in the work as originally completed." *Id.* at 318. We consider *Trinity*. In that case the inspector refused to approve the original work unless defective parts were replaced. This is to be distinguished from the situation in which labor is supplied or material furnished to correct defects after the work has been completed.

Appellee's other assertions of error also are without merit.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (FRAP 35; Local Fifth Circuit R. 12), the Petition for Partial Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.